

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

06 GARY C. TANNER, ) CASE NO. C07-0713-JCC-MAT  
07 Plaintiff, )  
08 v. ) REPORT AND RECOMMENDATION  
09 DR. KENNEY, et al., )  
10 Defendants. )  
\_\_\_\_\_  
)

## INTRODUCTION

13 Plaintiff proceeds *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 action. He  
14 includes in his amended complaint a request for a preliminary and permanent injunction ordering  
15 defendants to cease retaliation and to forbid his transfer “to another prison where his mental illness  
16 cannot be addressed before treatment [currently ongoing] can continue.” (Dkt. 18 at 4.)

17 Before the Court issued its ruling granting plaintiff's motion to file his amended complaint,  
18 defendants filed a response to an “Order to cause for a Injunction a Temporary Restraining  
19 Order[,]” which they construed as a motion for a temporary restraining order and preliminary  
20 injunction. (Dkt. 21 at 1.) However, defendants provided no citation to the perceived motion and  
21 it was not apparent to the Court whether such a motion had been filed, or whether defendants  
22 were responding to language contained within a proposed amended complaint the Court had

previously deemed inadequate. (See Dkt. 15.)

It has now come to the Court’s attention that the perceived motion to which defendants were responding was attached to and docketed as an exhibit to a previously addressed motion for appointment of counsel. (*See* Dkt. 19, Ex. at 4.) Accordingly, the Court now belatedly responds to the requests for a temporary restraining order and preliminary injunction contained within that document (hereinafter “plaintiff’s motion”). (*See id.*) Having considered plaintiff’s motion, defendants’ response, and the remainder of the record, it is recommended that plaintiff’s motion be denied for the reasons set forth below.

## **DISCUSSION**

A grant of preliminary injunctive relief requires: ““(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).”” *Johnson v. California State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (quoted case omitted). Alternatively, a moving party may show *either* a combination of likely success on the merits and the possibility that he/she will suffer irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in the moving party’s favor. *Id.* (cited sources omitted).

“Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury.” *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). *Accord Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (“At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm.”) “Speculative injury does not constitute irreparable injury

01 sufficient to warrant granting preliminary relief. A plaintiff must do more than merely allege  
02 imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened  
03 injury as a prerequisite to preliminary injunctive relief.” *Carribean Marine Servs. Co.*, 844 F.2d  
04 at 674 (internal citation and other cited sources omitted). Also, as the United States Supreme  
05 Court has noted, “[i]t frequently is observed that a preliminary injunction is an extraordinary and  
06 drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the  
07 burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C.  
08 Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 2948, pp. 129-30 (2d ed. 1995))  
09 (emphasis added by Supreme Court).

10 In this case, plaintiff seeks a preliminary injunction enjoining defendants or others from  
11 using infractions to punish him for seeking access to the courts. (Dkt. 19, Ex. at 4.) He further  
12 seeks to restrain defendants or others from transferring him “from his present mental health setting  
13 to a facility that [would] provide little if any therapy.” ( *Id.*) As discussed below, the Court  
14 concludes that plaintiff fails at a fundamental level to demonstrate any significant threat of  
15 irreparable injury.

16 With respect to the issue of a transfer, the Court first notes that, in general, a convicted  
17 prisoner does not have a right to be housed at a particular facility in a state prison system. *See*  
18 *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) (“The conviction has sufficiently extinguished  
19 the defendant’s liberty interest to empower the State to confine him in *any* of its prisons.”; “[T]he  
20 Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer  
21 from one institution to another within the state prison system.”) (emphasis in original). *But see*  
22 *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (“[P]rison officials [may not] transfer an

01 inmate to another prison in retaliation for the inmate's exercise of his First Amendment right to  
02 pursue federal civil rights litigation.") Moreover, in this case, plaintiff does not show, or even  
03 allege, the existence of any significant threat of a transfer. Instead, any such harm appears to be  
04 purely speculative and, consequently, insufficient to warrant the relief requested. Indeed, the  
05 Court notes that, in the several months since he filed his motion, plaintiff has not been transferred.

06 Nor does plaintiff present a significant threat of irreparable injury on the issue of retaliatory  
07 infractions. This claim relates to an infraction plaintiff received from defendant correctional officer  
08 McIntrye in May 2007, following the filing of this lawsuit. (See Dkt. 18 at 4 and Dkt. 19, Ex. at  
09 1 & 3.) Yet, documents provided by respondents show that this infraction was promptly dismissed  
10 based on the conclusion that the appropriate forum for resolving the issue resided in the legal  
11 proceedings in this case. (Dkt. 21, Ex. 1 and Attach A.) As such, there is no evidence plaintiff  
12 has or will suffer any irreparable harm absent the requested judicial intervention. Accordingly,  
13 plaintiff is not entitled to the relief sought.

14 CONCLUSION

15 For the reasons set forth above, the Court recommends that plaintiff's motion for a  
16 temporary restraining order and preliminary injunctive relief (Dkt. 19, Ex. at 4) be denied. A  
17 proposed Order accompanies this Report and Recommendation.

18 DATED this 5th day of November, 2007.

19  
20   
21 Mary Alice Theiler  
22 United States Magistrate Judge